South Carolina Law Review

Volume 10 | Issue 3 Article 5

Spring 1958

Punitive Damages for Breach of Contract in South Carolina

Henry Summerall Jr.

PUNITIVE DAMAGES FOR BREACH OF CONTRACT IN SOUTH CAROLINA

I. INTRODUCTION

Few rules of law command such a large following as the common law rule that only actual or compensatory, not punitive damages, may be recovered in an action for breach of contract.[1] The sole exception at common law was an action for breach of promise of marriage[2] in which exemplary damages were recoverable because the measure of damages applicable to ordinary contracts was wholly inadequate.

Several common law jurisdictions, however, have developed further exceptions to the general rule and allow recovery of punitive damages for breach of contract in some other situations, but these states are a small, but growing minority. The purpose of this discussion is to analyze these exceptions, especially as to the rule in South Carolina.[3]

Certain closely related situations will have to be distinguished. This note does not purport to analyze the law other than in those cases which proceed on a contract theory to recover actual damages for the breach of contract itself, i. e., actions *ex contractu* as distinguished from those *ex delicto*, and in which punitive damages are also recovered. Thus, tort actions for fraud and deceit are excluded from consideration except for comparison. Likewise excluded are those tort cases in which the duty which the defendant breached arose out of a contract or was a duty owed to the public whose breach also involved breach of a private contract.[4]

1. *E.g.*, Addis v. Gramophone Company, Ltd., [1909] A. C. 488, 3 B. R. C. 98, 16 Ann. Cas. 98 (House of Lords). *See, e.g.*, Hurxthal v. St. Lawrence Boom & Lumber Co., 53 W. Va. 87, 44 S. E. 520, 97 Am. St. Rep. 954 (1903).

2. *E.g.*, Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561 (1870); Drobnich v. Bach, 159 Minn. 258, 198 N. W. 669 (1924). *See, e.g.*, Morgan v. Muench, 181 Iowa 719, 156 N. W. 819 (1916); Baumle v. Verde, 33 Okla. 243, 124 Pac. 1083, Ann. Cas. 1914B 317 (1912).

3. See annotation, 84 A. L. R. 1345. For a more complete discussion of the insurance aspects of the problem and the South Carolina insurance cases allowing recovery of punitive damages, see Howser, *The Awarding of Punitive Damages for Breach of Insurance Contracts in South Carolina*, 1 S. C. L. Q. 150 (1948). Mr. Howser's discussion includes tort cases in fraud and deceit as well as those for breach of contract accompanied by a fraudulent act.

4. Such as suits against telegraph companies for non-delivery of messages, against power companies for failure to supply electricity, or against common carriers for wrongful ejection.

It has sometimes been said that South Carolina is the only state in which punitive damages may be recovered for breach of contract.[5] This is not strictly accurate, for several other American jurisdictions are in the minority with South Carolina.

TEXAS. Texas has a rule which we may term the "independent tort" rule which allows recovery of punitive damages for breach of contract if the breach is accompanied by an independent tort which is aggravated. For punitive damages to be recovered in such an action on contract, the breach must be accompanied by a tort for which an action would lie in which punitive damages could be recovered for the tort, independently of any right to recover actual damages for the breach of contract alone.[6] Thus, the tort itself must be fraudulent, malicious or oppressive.[7] The manner in which the contract is breached may amount to a tort;[8] or the tort may consist of some other act which accompanies the breach of contract.[9] However, the tort must be connected with the breach of contract;[10] therefore, if it occurs after the breach, no punitive damages can be recovered in an action on the contract.[11]

In one case illustrating the Texas rule, an employer not only discharged the plaintiff, but also slandered her by calling her a liar; she recovered actual damages for the breach of the employment contract and punitive damages for the slander, for it was an independent tort.[12] Another defendant breached his contract to grant plaintiff a concession in a department store to operate a meat market and then refused to let plaintiff remove his equipment unless he released his cause of action for breach of contract; the independent tort

5. Mooney, *Punitive Damages for Breach of Insurance Contracts in South Carolina*, Insurance Law Journal, Jan. 1955, p. 20; Howser, *supra* note 3, at 150.

6. *See* Hooks v. Fitzenrieter, 76 Tex. 277, 13 S. W. 230 (1890).

7. *See* Briggs v. Rodriguez, 236 S. W. 2d 510, 515 (Tex. Civ. App. 1951).

8. *See* Hooks v. Fitzenrieter, note 6, *supra; e.g.*, National Finance Co. v. Abernathy, 66 S. W. 2d 358 (Tex. Civ. App. 1934).

9. *E.g.*, Scheps v. Giles, 222 S. W. 348 (Tex. Civ. App. 1920).

10. *See* A. L. Carter Lumber Co. v. Saide, 140 Tex. 523, 168 S. W. 2d 629 (1943); National Finance Co. v. Fregia, 78 S. W. 2d 1081 (Tex. Civ. App. 1935).

11. Oklahoma Fire Ins. Co. v. Ross, 170 S. W. 1062, 1066 (Tex. Civ. App. 1914).

12. Scheps v. Giles, 222 S. W. 348 (Tex. Civ. App. 1920).

was the conversion.[13] And in another case, defendant defrauded ignorant and illiterate Mexicans in a land sale contract and they recovered $300 actual damages for breach of contract and $1,000 punitive damages for fraud.[14]

The rule in South Carolina, as we shall presently see, is that in an action for breach of contract, punitive damages are recoverable if the breach is accompanied by a fraudulent act. The Texas rule seems broader than that in South Carolina, for it allows punitive damages for any kind of independent aggravated tort, while ours is restricted to fraud. However, in Texas in cases where a fraudulent act accompanies the breach of contract, there is the restrictive requirement that the fraudulent act inflict some other and different injury besides that flowing from the breach of contract without fraud in order for the plaintiff to recover punitive damages.[15] There is no such requirement of additional injury in South Carolina. Seemingly, the South Carolina rule has been developed further than the Texas rule within its own more narrow limits because of the greater volume of cases applying it; and our rule has been developed most extensively in the field of insurance contracts into which the Texas rule has not yet been extended.

NEW MEXICO. The situation as to the law in New Mexico is most interesting. An earlier tort case there for fraud and deceit had said by way of dicta that punitive damages were recoverable when the breach was accompanied by a fraudulent act or when the wrongdoing was aggravated, wanton, or maliciously intentional.[16] In a recent case the Supreme Court adopted this dictum as law and affirmed an award of punitive damages for breach of contract where the defendant, a seed buyer under contract to plaintiff, had falsified weight records, the falsification being a fraudulent act.[17] The Court seemed to adopt the South Carolina "fraudulent act" rule expressly, citing our case of *Holland v. Spartanburg Herald-Journal Co.*[18]

13. Morgan v. Steinberg, 23 S. W. 2d 527 (Tex. Civ. App. 1929).
14. Briggs v. Rodriguez, 236 S. W. 2d 510 (Tex. Civ. App. 1951).
15. Littlefield v. Clayton Brothers, 194 S. W. 194, 199 (Tex. Civ. App. 1917).
16. Stewart v. Potter, 44 N. M. 460, 104 P. 2d 736 (1940).
17. Whitehead v. Allen, 63 N. M. 63, 313 P. 2d 335 (1957).
18. 166 S. C. 454, 165 S. E. 203, 84 A. L. R. 1336 (1932).

MISSISSIPPI. The Supreme Court of Mississippi has stated the rule that punitive damages are recoverable for breach of contract only if the breach is " . . . attended by some intentional wrong, insult, abuse, or gross negligence, which amounts to an independent tort."[19] This seems a broader statement of the "independent tort" rule than in Texas. But other than in cases involving common carriers, which proceed on a tort theory, it has been applied in only one other case. There the defendant was held liable in actual and punitive damages for breaking plaintiff's fence in violation of a contract, thus allowing his cows to stray.[20] Although the case could have been rationalized on the theory that breaking the fence was a trespass, a tort, the Court treated it as an independent tort accompanying the breach of contract and affirmed the earlier statement of the rule.

IOWA. In a recent Iowa case[21] a tenant sued his landlord for breach of contract, including breach of a covenant for quiet enjoyment. The Court affirmed a verdict for plaintiff for actual and punitive damages, stating the various exceptions to the general rule American courts have developed, and seemed to rest its holding as to punitive damages on a finding of oppression and malice on the landlord's part.

OTHERS. Three other states have dicta in recent cases which strongly indicate that they would allow recovery of punitive damages for breach of contract in proper cases, at least where the breach amounts to an independent tort. They are Missouri,[22] Florida,[23] and Kansas.[24] It is worthy of note that the two Kansas cases are both against insurance companies.

Most of these recent cases favoring allowance of punitive damages in contract cases cite passages in treatises and en-

19. American Ry. Express Co. v. Bailey, 142 Miss. 622, 107 So. 761, 763 (1926). *See* Hood v. Moffett, 109 Miss. 757, 69 So. 664, L. R. A. 1916B 622, Ann. Cas. 1917E 410 (1915).

20. D. L. Fair Lumber Co. v. Weems, 196 Miss. 201, 16 So. 2d 770, 151 A. L. R. 631 (1944).

21. Kuiken v. Garrett, 243 Iowa 785, 51 N. W. 2d 149, 41 A. L. R. 2d 1397 (1952).

22. Williams v. Kansas City Public Service Co., ___ Mo. ___, 294 S. W. 2d 36 (1956).

23. Griffith v. Shamrock Village, 94 So. 2d 854 (Fla. 1957).

24. Moffet v. Kansas City Fire & Marine Ins. Co., 173 Kan. 52, 244 P. 2d 228 (1952); Mabery v. Western Casualty & Surety Co., 173 Kan. 586, 250 P. 2d 824 (1952).

cyclopedias which are largely based on South Carolina cases. Many of them rely on the annotation of the *Holland* case.[25] Thus, it appears that our peculiar rule has had some appreciable effect on American law. And when the natural tendency of dicta to become law is considered, it seems reasonable that our heretofore unique doctrine will have further effect on the future development of the law in this area.

Let us now examine the South Carolina rule and see whence it came and determine its present status.

II. THE RULE IN SOUTH CAROLINA

A. Its Origin and History

The 1904 case of *Welborn v. Dixon*[26] is the great-grandfather of South Carolina's peculiar rule. The plaintiff had deeded land to defendant by an instrument in form an absolute conveyance but intended as a mortgage to secure a debt of $385. Contemporaneously with the deed, the defendant had agreed in a written contract to deed the land back to the plaintiff upon payment of the $385. However, before the time for reconveyance had expired, the defendant conveyed the land away to a third party for $600. Plaintiff sued for breach of contract, praying for $2,000 damages. Defendant's demurrer to the complaint was overruled and the Supreme Court affirmed, saying that defendant was guilty of an equitable fraud, and holding, per Justice Gary:[27]

> There are allegations also not only appropriate to an ordinary action for damages arising *ex contractu*, but showing that the breach of contract was accompanied by a fraudulent act. . . . There is no doubt as to the general principle, that in an action for breach of contract the motives of the wrongdoer are not to be considered in estimating the amount of damages, and that he is only liable for such damages as are the natural and proximate result of the wrongful act. When, however, the breach of the contract is accompanied with a fraudulent act, the rule is well settled, certainly in this State, that the defendant may be made to respond in punitive as well as compensatory damages.

25. 166 S. C. 454, 165 S. E. 203, 84 A. L. R. 1336 (1932).
26. 70 S. C. 108, 49 S. E. 232, 3 Ann. Cas. 407 (1904).
27. *Id.* at 115.

In support of his holding the Court quoted from Sedgwick on Damages and relied as precedent on the old case of *Rose & Rodgers v. Beattie*[28] in which Judge Nott had said that in cases of fraud, the jury could give vindictive damages, or "imaginary damages" as he quaintly termed them, even though the action was in assumpsit. The reasons for the Court's decision were, in substance, that the fraudulent act amounted to a tort for which exemplary damages could be recovered in a tort action because of its malicious and fraudulent nature, and that to prevent plaintiff from recovering them merely because his suit was on the contract would be to give effect to the common law forms of action abolished by the Code of 1870.[29]

Justice Woods in dissent in the *Welborn* case pointed out that Judge Nott's statements in the older cases[30] were mere dicta, and that to allow punitive damages in this case would surely result in " . . . disastrous uncertainty in the administration of the law of contracts. . . ."[31] The justice also felt that a wilful and fraudulent refusal to pay a debt would result in punitive damages under the view of the majority of the Court, a result which the later cases have not reached.

The doctrine of the *Welborn* case did not immediately spring to life but lay almost dormant for thirty years or so. In the next case involving the rule, a 1907 insurance case, recovery of punitive damages was denied because no fraudulent act had been pleaded.[32] The same reason was given for denying recovery in a 1912 case against an electric power company.[33] In a 1913 case the act allegedly fraudulent was refusal to

28. 2 Nott & McCord 538 (S. C. 1820).

29. CODE OF LAWS OF SOUTH CAROLINA, 1952 §10-8. One form of action established. "There shall be in this State but one form of action for the enforcement or protection of private rights and the redress of private wrongs which shall be denominated a civil action."

30. Rose & Rodgers v. Beattie, note 28 *supra*; Farrand v. Bouchell, Harper 83 (S. C. 1823).

31. Welborn v. Dixon, 70 S. C. 108, 122, 49 S. E. 232, 3 Ann. Cas. 407 (1904).

32. Prince v. State Mutual Life Ins. Co., 77 S. C. 187, 57 S. E. 766 (1907). The complaint alleged that defendant breached its contract to deliver a ten year life insurance policy but instead tried to compel plaintiff to accept another policy by threatening him with imprisonment. The Court said: "As no fraudulent act is here alleged, exemplary damages cannot be recovered." 77 S. C. at 193.

33. Givens v. North Augusta Electric and Improvement Co., 91 S. C. 417, 74 S. E. 1067 (1912). The suit was for breach of a contract to furnish electricity which plaintiff alleged had been wilfully and wantonly breached. The Court said (91 S. C. at 424) that this was not an allegation of fraud, hence punitive damages were not recoverable.

furnish promised money; recovery of punitive damages was denied because no fraudulent act had been pleaded nor proved.[34] The first case after the *Welborn* case to allow recovery of punitive damages was a 1918 suit against a telegraph company which was really based on the breach of duty of a common carrier, which is a tort.[35] The first case proceeding on a contractual theory to allow recovery of punitive damages was a 1921 case in which a landowner breached a sharecropper's contract by running him off after the crop had been laid by and seizing his half of the crop.[36] A 1923 case, scantily reported,[37] and since overruled,[38] allowed punitive damages apparently for a fraudulent breach of warranty.

The rule did not become really firmly established in our law until the Court was presented with a series of suits on insurance contracts alleged to have been breached accompanied by fraudulent acts, beginning in the Depression and continuing to the present time. The *Williams* case[39] was the first in which punitive damages were assessed against an insurance company,[40] but it was a tort action for fraud and deceit. It is somewhat surprising to learn that the first insurance case allowing recovery of punitive damages for a breach accompanied by a fraudulent act was as late as 1931, a case in

34. Donaldson v. Temple, 96 S. C. 240, 80 S. E. 437 (1913). Although it does not appear in the majority opinion what the alleged fraudulent act was, it appears from the dissent (96 S. C. at 244) that it was the neglect and refusal to furnish money as contracted.

35. Reaves v. Western Union Telegraph Co., 110 S. C. 233, 96 S. E. 295 (1918) (reckless delay in transmitting telegraphed money).

36. Sullivan v. Calhoun, 117 S. C. 137, 108 S. E. 189 (1921).

37. Huffman v. Moore, 122 S. C. 220, 115 S. E. 634 (1923).

38. *See* Holland v. Spartanburg Herald-Journal Co., 166 S. C. 454, 468, 165 S. E. 203, 84 A. L. R. 1336 (1932).

39. Williams v. Commercial Casualty Ins. Co., 159 S. C. 301, 156 S. E. 871 (1931). Defendant's agent had changed the words "sample copy" on the policy to "1928 Cereal copy" and sold it to a plaintiff even more illiterate than himself. Plaintiff recovered $1000 actual and punitive damages in a tort action for fraud and deceit. Defendant appealed only on a point of agency law and lost. On principles of agency law, the principal will be liable in punitive damages for a fraudulent act of his agent accompanying a breach of contract if the fraudulent act was done "'in the course of the agency and by virtue of the authority as agent,'" Williams v. Ins. Co., *supra;* but the principal will not be so liable if the fraudulent act was outside the scope of the agency, even though it was a gross fraud. Rast v. Sovereign Camp, W. O. W., 190 S. C. 201, 2 S. E. 2d 400 (1939) (agent had no authority to bind the company to a particular construction of the policy terms). For a recent agency case, see Taylor v. U. S. Casualty Co., 229 S. C. 230, 92 S. E. 2d 647 (1956), involving an alleged fraudulent breach of an "assigned risk" auto liability insurance policy.

40. Howser, *supra* note 3, at 151.

which an insurance agent obtained possession of a policy and premium receipt book from plaintiff by fraudulent representations and the company denied liability under the policy and retained possession of the papers; a verdict for plaintiff of $186 actual and $2,000 punitive damages was affirmed.[41] In 1932 the Court handed down three opinions involving fraudulent breach of insurance contracts and one involving an employment contract.[42] At about that time the rule in South Carolina began giving concern to insurance companies, for in 1932 a leading insurance counsel indicated as much in a speech in Toronto, Canada.[43] In the years immediately following, the Court was almost engulfed with a deluge of cases involving fraudulent breaches. For example, in the year 1935 there were no less than ten cases in the Supreme Court on that theory, not counting the cases proceeding on the older theory of fraud and deceit. The number of cases was at a peak during the Depression years, but even so, there are at least three or four cases on the point in the Supreme Court every year up to the present.

For the past twenty-five years or so one could probably draw a very close correlation between the health of South Carolina's economy and the number of cases in the Supreme Court which proceed on the theory that a contract, usually an insurance policy, has been breached accompanied by a fraudulent act.

Having thus traced the history of the rule, let us now examine it to see exactly what the correct statement of the rule is and what the requisite elements for recovery of punitive damages are.

B. Variant Statements of the Rule

The South Carolina rule has been stated in several different ways in its fifty-year existence. Some of these variants are

41. Bradley v. Metropolitan Life Ins. Co., 162 S. C. 303, 160 S. E. 721 (1931).

42. Insurance:
McLoud v. Metropolitan Life Ins. Co., 167 S. C. 309, 166 S. E. 343 (1932); Wilkes v. Carolina Life Ins. Co., 166 S. C. 475, 165 S. E. 188 (1932); Derrick v. North Carolina Mutual Life Ins. Co., 167 S. C. 434, 166 S. E. 502 (1932).
Employment:
Holland v. Spartanburg Herald-Journal Co., note 38 *supra*.

43. P. M. Estes, general counsel of the Life and Casualty Insurance Company of Tennessee. See *Proceedings of the Legal Section, American Life Convention (1932)*, p. 169.

mere verbal variations while others would make substantial changes in the law if literally applied.

1. *"Fraudulent Act"*

In the leading case Justice Gary said that the breach there was accompanied by a fraudulent act and stated the rule to be that the defendant was liable in punitive as well as compensatory damages when the breach was "accompanied with a fraudulent act."[44] When the preposition "with" is changed to "by", this is believed the orthodox statement of the rule and is preferable to the others because it is more concise and contains all the elements which later cases have held essential.

2. *"Fraudulent Intent"*

The first heresy to rear its head came eight years later in the *Givens* case[45] in which Justice Hydrick said that punitive damages were recoverable when " . . . the breach is accompanied by an intent to defraud the other party to the contract."[46] This statement, if followed, would have made a fundamental change in the doctrine. Later cases, however, have said that no matter how malicious or fraudulent the intent with which the breach is accomplished, punitive damages are recoverable only if the requisite fraudulent *act* is present. A wilful or deliberate violation of a contract alone is not sufficient.[47] A breach accomplished with a fraudulent

44. Welborn v. Dixon, 70 S. C. 108, 115, 49 S. E. 232, 3 Ann. Cas. 407 (1904).

45. Givens v. North Augusta Electric & Improvement Co., 91 S. C. 417, 74 S. E. 1067 (1912).

46. *Id.*, 91 S. C. at 424.

47. In Collopy v. Citizens Bank of Darlington, 223 S. C. 493, 77 S. E. 2d 215 (1953), the complaint alleged that plaintiff notified defendant that plaintiff was the true owner of funds which plaintiff's agent had deposited with defendant bank, and that defendant refused to allow plaintiff to prove his title and paid the balance over to the agent who absconded. On motion to strike allegations as to punitive damages, the Court held they were not recoverable, since plaintiff's cause of action was *ex contractu*, since no fraud of defendant was alleged, and since a wilful breach of contract did not give rise to a liability for punitive damages.

In Lamb v. Metropolitan Mutual Fire Ins. Co., 183 S. C. 345, 191 S. E. 56 (1937), a suit on a fire insurance policy, plaintiff demanded punitive damages (in second cause of action), alleging that at the time the contract was made, defendant expressly waived any question as to the status of furniture and fixtures which plaintiff held under title retention contracts and that after loss, defendant disclaimed liability on grounds they were encumbered with mortgages. A demurrer as to punitive damages was sustained, for "[n]o amount of wilfulness or deliberateness in the breach of a contract will warrant punitive damages." 183 S. C. at 349.

intent (without a fraudulent act) is not sufficient.[48] It has been said that " . . . proof of the mere violation of a contract will not support an allegation of fraud . . ."[49] and even that the breach is not of itself evidence of fraud.[50] However, Justice Hydrick undertook to correct his error by writing a special concurring opinion the next year:[51]

> Instead of saying that such damages [punitive] are not recoverable, except where the breach is accompanied by a fraudulent *intent,* I should have said, except where the breach is accompanied by a fraudulent *act,* resulting in damage to the other party to the contract, which is as far as any of our cases have gone. . . .

3. *"Cause of Action for Fraud"*

The next variation in the rule came in another opinion by Justice Hydrick in which he said that " . . . punitive damages are not recoverable for the mere breach of a private contract, in the absence of circumstances giving rise to a cause of action for fraud."[52] This statement has been cited and quoted in at least three cases, but it has not gained acceptance as the general and orthodox statement of the rule. It will be discussed more fully in a later section of this note[53]

In Bennett v. Dodge Bros. Corp., 169 S. C. 389, 169 S. E. 80 (1933), the suit was for breach of a contract to repurchase repair parts on hand upon cancellation by defendant of plaintiff's auto sales agency franchise, the breach allegedly being wilful, wanton and with intent to defraud. The default judgment was reversed as to punitive damages, for there was no allegation of an act of fraud.

48. In Branham v. Wilson Motor Co., 188 S. C. 1, 198 S. E. 417 (1938), the complaint alleged that at the time plaintiff bought a used car, as an inducement, defendant agreed to insure it against fire, theft and collision out of a $43 payment, defendant at the time having no intention of carrying out the agreement; that defendant bought fire and theft insurance for $7.02 but failed to buy collision insurance, retaining the balance of the payment. The Court affirmed striking out of allegations as to punitive damages, saying that the fraudulent act of taking the money did not accompany the *breach,* but rather accompanied the *formation* of the contract.

In Hall v. General Exchange Ins. Corp., 169 S. C. 384, 169 S. E. 78 (1933), a suit on a fire insurance policy on plaintiff's truck, the complaint alleged that defendant agreed to settle for $85 plus payment of a lien, but that with the intent to defraud plaintiff, defendant refused to pay the agreed amount. Recovery of punitive damages was denied, the Court saying that although defendant may have had intent to defraud in the breach of contract, there was no fraudulent act on his part as to the breach. 169 S. C. at 388.

49. Caldwell v. Duncan, 87 S. C. 331, 339, 69 S. E. 660 (1910).

50. Coleman v. Stevens, 124 S. C. 8, 15, 117 S. E. 305 (1923).

51. Donaldson v. Temple, 96 S. C. 240, 243, 80 S. E. 437 (1913).

52. Reaves v. Western Union Telegraph Co., 110 S. C. 233, 238, 96 S. E. 295 (1918).

53. See pages 476-482 *infra.*

which will attempt to show that it is a valid statement of the rule only if it includes both legal and equitable causes of action for fraud.

4. *"Fraudulent Intention Plus Fraudulent Act"*

Chief Justice Blease stated the rule thusly: "To recover damages of that character [punitive], the plaintiff must show that the breach was accomplished with a fraudulent intention, and was accompanied by a fraudulent act."[54] This statement has been quoted in several later cases. If saying that an act was fraudulent implies that the actor had a fraudulent intention, this form of the rule adds no new requirement to the orthodox statement by Justice Gary, but it does focus attention on the element of intent, which is a necessary element of fraud, and is valuable for that reason.

5. *"Fraudulent Breach of Contract Is a Tort"*

The statement of the rule which has given rise to most difficulty originated in the *Dyson* case[55] in which the Court on appeal adopted the statement of the trial judge that " . . . a fraudulent breach of contract is a tort." The expression "fraudulent breach of contract" is common in the cases as apparently synonymous with "breach of contract accompanied by a fraudulent act," but the statement that this action is a tort was novel in the *Dyson* case.

Several later cases have quoted the statement. In the *Broome* case[56] the Court said: "Whether such holding is in conflict with expressions used by the court in some of its prior decisions is not here important." But later in the *Bourne* case[57] it was important. An administrator, deceased, had forged certain checks and misappropriated estate assets. Suit was brought against his personal representative (administratrix) within less than one year from his death. His administratrix demurred to the complaint on grounds that the suit was for a debt, hence could not be maintained against her in her

54. Williams v. Metropolitan Life Ins. Co., 173 S. C. 448, 462, 176 S. E. 340 (1934).

55. Dyson v. Commonwealth Life Ins. Co., 176 S. C. 411, 415, 180 S. E. 475 (1935).

56. Broome v. Travelers Ins. Co., 183 S. C. 413, 418, 191 S. E. 220 (1937).

57. Bourne v. Maryland Casualty Co., 185 S. C. 1, 192 S. E. 605, 118 A. L. R. 1 (1937).

official capacity.[57a] The Court, however, in affirming the overruling of the demurrer said that the cause of action was one for fraudulent breach of contract, which is a tort, and therefore could be maintained before the year had passed. In the *Babb* case[58] three of defendant's four exceptions challenged the correctness of the rule that a fraudulent breach of contract is a tort, but the Court found the question immaterial and declined to pass on it.

It is obvious that an action for fraudulent breach of contract (or, synonymously, for breach of contract accompanied by a fraudulent act) partakes of elements of both contract and tort. To say that an action for fraudulent breach of contract is a tort is to say that the fraud is the essence of the thing, and that the breach of contract is merely incidental thereto as a convenient measure of actual damages. One can imagine several situations besides that in the *Bourne* case[59] in which it makes a difference whether an action for fraudulent breach of contract is classified as an action in tort or in contract.

The Court has passed on at least four of these situations and has held: 1) Where a breach of contract only is proved, but no fraudulent act, the plaintiff can recover actual damages for the breach of contract but no punitive damages.[60] 2) In a fraudulent breach action, there must be proof of actual damages, or at least of nominal actual damages, to support a verdict awarding punitive damages.[60a] 3) If the plain-

57a. CODE OF LAWS OF SOUTH CAROLINA, 1952 §19-554. "No action shall be commenced against any executor or administrator for the recovery of debts due by the testator or intestate until twelve months after such testator's or intestate's death." (See 1956 amendment and change of this section.)

58. Babb v. Paul Revere Life Ins. Co., 224 S. C. 1, 77 S. E. 2d 267 (1953).

59. Note 57 *supra.*

60. Broome v. Travelers Ins. Co., 183 S. C. 413, 191 S. E. 220 (1937).

60a. Monroe v. Bankers Life & Casualty Co., Westbrook's Adv. Ops., Feb. 22, 1958, in which the Supreme Court reversed a jury verdict of no actual damages and $2890 punitive damages ($100 less than prayer of complaint) and entered judgment for defendant, quoting from Cook v. A. C. L. RR, 183 S. C. 279, 281, 190 S. E. 923, 924 (1937), a negligence case: "Exemplary damages do not and cannot exist as an independent cause of action, but such damages are mere incidents to the cause of action and can never constitute the basis thereof. If the injured party has no cause of action independent of a supposed right to recover exemplary damages, then he has no cause of action at all; consequently, there must be allegations of actual or nominal damages in the pleadings and a proof thereof in the trial of the cause in order to support a verdict for punitive damages alone." *See* also Barnes v. Industrial Life & Health Ins. Co., 201 S. C. 188, 22 S. E. 2d 1 (1942).

tiff first brings suit for breach of contract, seeking only actual damages, and loses, he cannot seek actual and punitive damages in a second suit for breach of contract accompanied by a fraudulent act; there is identity of subject matter despite the asserted claim of fraud in the second suit; hence the bar of *res judicata* is complete.[61] 4) The burden of proof of fraud is by evidence which is clear, cogent and convincing.[62]

In two recent cases, *Cain v. United Ins. Co.*[63] and *Ross v. American Income Life Ins. Co.*,[64] the Court said that an action

61. Smith v. Volunteer State Life Ins. Co., 201 S. C. 291, 22 S. E. 2d 885 (1942); Glenn v. Metropolitan Life Ins. Co., 202 S. C. 316, 24 S. E. 2d 609 (1943).

62. *See* Holder v. Sovereign Camp, W. O. W., 180 S. C. 242, 247, 185 S. E. 547 (1936), an action for fraudulent cancellation of an insurance policy. However, in such a case a jury question as to punitive damages is presented if there is a scintilla of evidence tending to show a breach of contract accompanied by a fraudulent act; a directed verdict for defendant is proper only if the court can conclude, as a matter of law, that the evidence in the case excludes all reasonable inferences of fraud. Calder v. Commercial Casualty Ins. Co., 182 S. C. 240, 245, 188 S. E 864 (1936). But a jury verdict as to a fraudulent act cannot be based on conjecture. Snellgrove v. Life Ins. Co. of Va., 176 S. C. 178, 179 S. E. 784 (1935).

63. Westbrook's Adv. Ops., March 8, 1958. Plaintiff, beneficiary of a policy on her husband's life, recovered a verdict of $240 actual and $1,750 punitive damages for fraudulent breach of the contract. The trial court granted judgment for defendant *non obstante veredicto* on grounds that the policy was obtained by false representations made by the insured in the application. The Supreme Court affirmed, *per* Mr. Justice Oxner:

> It follows from the foregoing that the cause of action for fraudulent breach of contract, which is regarded under our decisions as an action ex contractu, Broome vs. Travelers Insurance Co., 183 S. C. 413, 191 S. E. 220, must fail. Cp. Babb vs. Paul Revere Life Insurance Co., 224 S. C. 1, 77 S. E. (2d) 267. To sustain such a cause of action it is essential that there be a valid contract. Since the insurance policy upon which this action is based was procured by fraud, plaintiff can have no cause of action for the breach of it.

The Court said further that even if the fraudulent acts alleged to have accompanied the breach were proved, they " . . . would not vitalize the insurance contract or be of any aid in establishing a cause of action for the breach of it."

64. Westbrook's Adv. Ops., March 15, 1958. Plaintiff took out an accident and health insurance policy by mail in 1948 which was allegedly wrongfully cancelled in 1955. Plaintiff sued the two foreign insurance corporations (his original insurer and its re-insurer) in two separate actions: 1) for fraudulent breach of the contract and 2) for fraud and deceit inducing him to enter the contract. Service of process was made on the State Insurance Commissioner pursuant to the Uniform Unauthorized Insurers Act, CODE OF LAWS OF SOUTH CAROLINA, 1952 § 37-265. Defendants' motion to vacate and set aside the service was denied.

In a consolidated appeal, the Supreme Court affirmed the order as to the action for fraudulent breach but reversed as to that for fraud and deceit, holding: 1) The statute is constitutional; 2) The issuance and delivery by mail of a single policy is sufficient to sustain service

for fraudulent breach of contract is one *ex contractu,* not *ex delicto.*[65] The language in these cases seems an attempt by the Court to lay to rest the *Dyson* case[66] dictum that the action is in tort.

But problems remain in this shadowy borderland between tort and contract, the chief one being that of survival of the action. It is clear that after the death of the insured, the beneficiary may sue for a fraudulent breach of an insurance policy which was accomplished during the life of the insured[67] and may recover both actual and punitive damages.[68] If a cause of action for fraudulent breach of contract is one *ex contractu,* as the recent cases indicate, it is hard to see why it would not survive in favor of the personal representative of the insured; but the Court has held, seemingly, that it does not so survive.[69]

Even if the action were held to survive, there is still the question of damages: could the personal representative recover only actual damages or could he recover punitive damages also? In case of conflict between the insured's personal representative and the beneficiary, would there be a race to

---

under the statute — a showing of other transactions is not required; 3) Actions for fraudulent breach of insurance contracts are "actions or suits arising out of such policy or contract" within the meaning of the statute, but actions for fraud and deceit inducing an insured to enter such a contract are not within the provisions of such statute. Apparently, this is the first case in the state courts construing this section of the statute, which was passed in 1947.

65. In Ross v. American Income Life Ins. Co., note 64 *supra,* the Court *per* Mr. Justice Oxner said: "At the outset it may be stated that appellants are in error in stating that a cause of action for fraudulent breach of a contract is one ex delicto. Such an action is regarded under our decisions as ex contractu."

66. Dyson v. Commonwealth Life Ins. Co., note 55 *supra.*

67. Babb v. Paul Revere Life Ins. Co., 224 S. C. 1, 77 S. E. 2d 267 (1953). However, a suit for a fraudulent breach of contract brought by a beneficiary under a policy which reserves a right in the insured to change the beneficiary is prematurely brought if brought in the life of the insured. Shuler v. Equitable Life Assurance Society, 184 S. C. 485, 193 S. E. 46 (1937).

68. *See* Myers v. Industrial Life & Health Ins. Co., 170 S. C. 80, 169 S. E. 676 (1933).

69. Mattison v. Palmetto State Life Ins. Co., 197 S. C. 256, 15 S. E. 2d 117 (1941). Plaintiff joined two causes of action in her complaint: 1) for $308 actual damages due her as beneficiary; 2) for $1,500 actual and punitive damages due her as administratrix of her husband for a fraudulent cancellation of a policy on his life. The Court held that the second cause of action did not survive. The headnote to the case designates the cause of action as one for fraud and deceit, but from the allegations of the complaint, it appears to be a fraudulent cancellation that was alleged. (197 S. C. at 259). The Court in the body of its opinion did not characterize the action.

bring suit, so that the first one to serve the summons would bar a suit by the other? Suppose the policy were payable to the insured's estate. If there were a fraudulent cancellation, could the personal representative recover punitive damages? It is hard to see why a line should be drawn between a suit by a beneficiary and by the insured's personal representative in such a case. These questions have not yet come before the Court.

III. ELEMENTS OF THE ACTION FOR FRAUDULENT BREACH

Taking as our text the orthodox rule as laid down in *Welborn v. Dixon*,[70] let us analyze it in terms of the decisions to determine what elements are necessary before a plaintiff in South Carolina can recover punitive damages for breach of contract. That rule is that punitive damages are recoverable if, but only if, *the breach of contract is accompanied by a fraudulent act.*

A. THE BREACH OF CONTRACT

It is obvious that there must be a breach of the contract before any damages can be recovered, *a fortiori* before punitive damages for a fraudulent act accompanying the breach can be recovered. Therefore, if the contract is still in force and has not been breached at the time the suit is brought, that is, at the time the summons is served, no damages can be recovered. Thus, where an insurance policy was in force until February 22 and suit on it was brought on February 20, the Court held that a nonsuit had properly been granted, stating that plaintiff would have had a good cause of action for fraudulent breach of contract if she (her attorney) had waited patiently a few more days to sue.[71]

The difficult question is what is effectual as a breach. It has been held that cancellation of an insurance policy attempted by the insurer at a time when the premiums are paid up is ineffectual to breach the policy,[72] unless the insurer

70. 70 S. C. 108, 49 S. E. 232, 3 Ann. Cas. 407 (1904).

71. Bailey v. North Carolina Mutual Life Ins. Co., 173 S. C. 131, 175 S. E. 73 (1934).

72. Moore v. Standard Mutual Life Ass'n of S. C., 191 S. C. 196, 4 S. E. 2d 251 (1939). See also Herndon v. Continental Casualty Co., 144 S. C. 448, 142 S. E. 648 (1928).

tenders back the unearned premiums.[73] Likewise it has been held that cancellation attempted in a mode contrary to that prescribed by the policy is ineffectual.[74] But these cases have been greatly weakened, if not overruled, by a recent case in which lapse notices were sent to the insured, allegedly by mistake on the insurer's part, during the period for which the premiums had been paid up, and the Court held that the policy had been breached, affirming a verdict for plaintiff of $12 actual and $1,500 punitive damages.[75]

One important rule in this area is that punitive damages are not recoverable without proof of actual or at least nominal damages.[76] Since the claim for punitive damages is dependent on that for actual damages, if a previous suit for breach of contract sought only actual damages and resulted in judgment for defendant, that judgment is a bar to a subsequent suit for a breach of the contract accompanied by a fraudulent act seeking both actual and punitive damages.[77]

B. Accompanied By

The fraudulent act must accompany the breach and not be too far separated from it in point of time. If the fraudulent acts and representations are solely in the inception of the contract and none accompany the breach, punitive damages cannot be recovered in a suit for fraudulent breach of contract, and allegations of fraud may properly be stricken.[78] The Court has said that representations made in June 1939, when a contract was made, could not be said to accompany the

73. Kelly v. Guaranty Fire Ins. Co., 176 S. C. 275, 180 S. E. 35 (1935).

74. Cunningham v. Independence Ins. Co., 182 S. C. 520, 189 S. E. 800 (1937).

75. Davis v. Bankers Life & Casualty Co., 227 S. C. 587, 88 S. E. 2d 658 (1955).

76. Monroe v. Bankers Life & Casualty Co., Westbrook's Adv. Ops., Feb. 22, 1958; Barnes v. Industrial Life & Health Ins. Co., 201 S. C. 188, 22 S. E. 2d 1 (1942).

77. Glenn v. Metropolitan Life Ins. Co., 202 S. C. 316, 24 S. E. 2d 609 (1943); Smith v. Volunteer State Life Ins. Co., 201 S. C. 291, 22 S. E. 2d 885 (1942).

78. Branham v. Wilson Motor Co., note 48 *supra*. In Lilienthal v. S. C. Public Service Co., 174 S. C. 177, 177 S. E. 98 (1934), the complaint alleged that defendant sold plaintiff corporate securities by fraudulently representing that they constituted a first mortgage on his plant and by promising to refund the purchase price upon request. In a suit for breach of the contract to refund, allegations as to punitive damages were stricken from the complaint, for the false representations accompanied the making of the contract, not the breach. *See* also Lawson v. Metropolitan Life Ins. Co., 169 S. C. 540, 169 S. E. 430 (1933).

alleged breach in October 1940.[79] The proper remedy in such case is an action in tort for fraud and deceit.[79a] Cases have been reversed because the two actions of fraud and deceit and fraudulent breach were confused. One judge has stated: "Punitive damages are recoverable for the fraudulent breach of a contract accompanied by fraudulent acts in the making of the contract as well as in the breach thereof."[80] However, this statement is believed a mere dictum, for in that case fraudulent acts permeated the entire contract including the breach, and later cases have clearly stated the requirement that the fraudulent act accompany the breach.

It is clear that the fraudulent act may occur before the breach. In the leading case it occurred about three months before, and despite defendant's argument that the fraudulent act did not accompany the breach, the Court affirmed a verdict for plaintiff of punitive damages, stating:[81]

> The Court does not so understand the legal phrase to mean that the two acts, the act of breach and the act of fraud, must be committed almost simultaneously .... We know of no rule of law measuring in point of time this distance. It simply means that the two must be co-exist-

79. McCullough v. The American Workmen, 200 S. C. 84, 20 S. E. 2d 640 (1942). The complaint alleged that plaintiff bought insurance from defendant fraternal benefit association in reliance on statements in the policy that the dues would never increase, that the dues were increased, and that defendant brought about an unlawful cancellation by refusing to accept the former dues. A verdict for plaintiff was reversed, the Court holding: 1) although plaintiff could have sued for fraud and deceit inducing the contract, she had elected to sue for fraudulent breach of contract, hence the judge erred in charging the law of fraud and deceit; 2) since the action was one *ex contractu*, allegations as to fraud in the inception of the contract were surplusage; 3) since no fraudulent act in the breach of contract was proved, no punitive damages could be recovered. Note that the Court goes so far as to say, 200 S. C. at 91: "We hold that the plaintiff, having elected to sue upon an alleged breach of the contract, was estopped from asserting an action for fraud and deceit in its inception, that is, in its procurement. . . ."

79a. Smyth v. Fleischmann, 214 S. C. 263, 52 S. E. 2d 199 (1949). Complaint alleged that defendant induced plaintiff to accept employment in his bakery shop by promising her a higher salary and bonuses, defendant never intending to execute his contract, and that defendant discharged her within three weeks. The Court on appeal reversed an order striking allegations as to fraud and punitive damages, holding that the cause of action alleged was not one for breach of contract accompanied by fraudulent acts but rather for fraud and deceit in inducing a contract, and hence the allegations were appropriate.

80. Porter v. Mullins, 198 S. C. 325, 334, 17 S. E. 2d 684 (1941) (per Gaston, A. A. J.).

81. Bradley v. Metropolitan Life Ins. Co., 162 S. C. 303, 318, 160 S. E. 721 (1931).

ing, logically connected, and the one must be attendant upon the other.

Of course, in many cases the breach and the fraudulent act are one and the same. In one illustrative case the sending of lapse notices was the breach and the fraudulent act as well.[82] In another, defendant's refusal to accept a premium payment was both the fraudulent act and the breach.[83]

May the fraudulent act occur after the breach? No South Carolina case has been found in which this point was argued or decided; but a Texas case[84] has said that where the independent tort occurred after the breach, plaintiff could not recover punitive damages because it was not connnected with the breach.

C. A Fraudulent Act

The greatest difficulty in discussing the South Carolina rule is to define what a fradulent act is, but there is no doubt of the rule that in order for the plaintiff to recover punitive damages, there must be a fraudulent *act* accompanying the breach of contract.[85] A breach of contract committed with fraudulent intent, without a fraudulent act, is not sufficient.[86] In one case the Court said:[87] "A fraudulent act is of like character to a fradulent intention, but imports some definite act looking to the perpetration of the fraud."

In order better to examine this requirement that there be a fraudulent act, we can break it down into its two components: a) an act b) which is fraudulent. First, let us examine the requirement of an *act.*

a. An Act.

In a recent case the Court affirmed and quoted a county judge's instruction to the jury that even though the defendant had cancelled an insurance policy with the intent of defrauding the plaintiff, the jury could assess punitive damages only if they found there was "' . . . some positive,

82. Davis v. Bankers Life & Casualty Co., 227 S. C. 587, 88 S. E. 2d 658 (1955).
83. Davis v. Life Ins. Co. of Va., 195 S. C. 406, 11 S. E. 2d 433 (1940).
84. *See* Oklahoma Fire Ins. Co. v. Ross, 170 S. W. 1062, 1066 (Tex. Civ. App. 1914).
85. *See, e. g.,* Lamb v. Metropolitan Mut. Fire Ins. Co., 183 S. C. 345, 191 S. E. 56 (1937); Holland v. Spartanburg Herald-Journal Co., 166 S. C. 454, 165 S. E. 203, 84 A. L. R. 1336 (1932).
86. *See, e. g.,* the cases cited in note 48 *supra.*
87. Hardee v. Penn Mutual Life Ins. Co., 215 S. C. 1, 11, 53 S. E. 2d 861 (1949) (Baker, Ch. J.).

affirmative, overt act evidencing fraud . . .' " accompanying the breach but separate and distinct from it.[88] There is nothing strange or peculiar in the rule that fraud requires an act. The general rule applicable to all types of fraud, regardless of the remedy sought therefor, is that there is no actionable fraud without some *act*, and, according to some authority,[89] without some *overt* act. Without some act there is no actionable fraud, regardless of whether the remedy sought for the fraud is an action at law for damages for fraud and deceit,[90] or a suit in equity to rescind a contract,[91] or whether the fraud is asserted defensively.[92] Actionable fraud consists of two elements: 1) an intention to deceive, and 2) some act executing the intention.[93] An unexecuted purpose to defraud another cannot be actionable because such an unexecuted purpose can work no injury.[94] In the usual case of fraud, an action at law in tort for fraud and deceit, the act is the representation which usually consists of words; however, it may be accomplished by deeds as well.[95]

Although the cases say that some fraudulent *act* must accompany the breach of contract before the defendant will be liable in punitive damages, it seems to state the rule too broadly to say that some positive, affirmative, overt act is required.[96] For, where there is a duty to speak, silence may be fraud; non-disclosure of a material fact is actual fraud where there is a duty to disclose it.[97] And, even where there is no duty to speak, if one does speak, he thereby assumes a duty not to mislead his hearer and thereby becomes liable for deceit if his representation is false.[97a] And we shall see

88. Davis v. Bankers Life & Cas. Co., 227 S. C. 587, 592, 88 S. E. 2d 658 (1955) (J. McGowan of Greenville County Court).
89. 23 AM. JUR., *Fraud and Deceit* § 21.
90. Costello v. Barnard, 190 Mass. 260, 76 N. E. 599, 112 Am. St. Rep. 328, 3 L. R. A. (N. S.) 212 (1906).
91. Oswego Starch Factory v. Lendrum, 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53 (1881).
92. Keller v. Johnson, 11 Ind. 337, 71 Am. Dec. 355 (1858).
93. People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451 (1853).
94. Note 91 *supra*.
95. Chisolm v. Gadsden, 1 Strob. 220, 47 Am. Dec. 550 (S. C. 1847).
96. See notes 88 and 89 *supra*.
97. *See* Gardner v. Nash, 225 S. C. 303, 309, 82 S. E. 2d 123 (1954); Holly Hill Lumber Co. v. McCoy, 201 S. C. 427, 436, 23 S. E. 2d 372 (1942). Both cases are suits in equity, however; the first to set aside a sale, the second for specific performance of a contract to convey land in which fraud was a defense.
97a. In Lawlor v. Scheper, 232 S. C. 94, 101 S. E. 2d 269 (1957), an action by a buyer of real estate against a seller and his agents for fraud and deceit, agents of the defendant seller represented to plaintiff

that the fraudulent act need not be a positive, affirmative act to make the defendant liable for punitive damages; a fraudulent omission may likewise make him liable therefor.[98] Therefore, perhaps it would state the rule more accurately to say that punitive damages are recoverable for a breach of contract when the breach is accompanied by some fraudulent *conduct.*

b. Which is fraudulent.

The crux of the matter is the requirement that the act (or conduct) be fraudulent. What qualities of an act make it fraudulent?

The Court has never attempted an inclusive definition of fraud, largely because of the amorphous quality of the concept. However, the Court has quoted this statement several times:[99]

> Fraud assumes so many hues and forms that Courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the Court or jury in determining its presence or absence. While it has often been said that fraud cannot be precisely defined, the books contain many definitions, such as unfair dealing; the unlawful appropriation of another's property by design....

It is clear, however, that the intent of the actor to deceive is the essential element making his act fraudulent. "It is a state of mind, dependent on intent, which is provable by circumstantial evidence."[100] It is evidence or inference of an encompassing fraudulent design, of unfair dealing, that the Court looks for in these cases. For example, where a plaintiff has paid ten cents a week for twenty years on a life and health policy with $2 a week health benefits and a $20 death benefit,

---

buyer that the total amount due on two mortgages was $10,150. Defendants were held liable in actual damages for deceit when it later developed that the total due was actually $676.20 more than represented. The Court said: "It may be true, as counsel argue, that appellants owed no duty to furnish any information as to the amounts owing on the two mortgages but when they undertook to do so, they owed a duty not to mislead respondent." 101 S. E. 2d at 271.

98. See pages 469-473, 479-482 *infra.*

99. 12 R. C. L., *Fraud and Deceit* § 2.

100. Cook v. Metropolitan Life Ins. Co., 186 S. C. 77, 84, 194 S. E. 636 (1938).

making regular payments at her home to defendant's agent, and the agent quit coming after plaintiff filed a claim for sick benefits, causing the policy to lapse because plaintiff did not know where defendant's office was located, the Court was quick to affirm an award of punitive damages.[101] But conversely, in a similar situation, where the agent's custom was to collect premiums from the insured at work and the insured had changed jobs, if the agent makes repeated unsuccessful efforts to collect the premiums and in fact makes collections after he knows the insured had been hospitalized, there will be no inference of fraud.[102] Another factor the Court considers is whether the company or the agent will profit from the lapse.[103] Oftimes a web of circumstances unexplained by the insurer will warrant an inference of fraud, even though each act considered separately would not show bad faith.[104] "Fraud may be deduced not only from deceptive or false representations, but from facts, incidents, and circumstances which may be trivial in themselves, but decisive in a given case of the fraudulent design."[105]

However, the Court has held two classes of acts not fraudulent. First, the retention of money due under a contract cannot be a fraudulent act, under our cases. In the leading case, plaintiff suing for breach of an employment contract contended that by failing to pay him the promised salary, defendant had appropriated plaintiff's property to his own use. The Court rejected this argument, saying that no implication of fraud arose from an unpaid debt.[106] The Court has re-

101. Hutcherson v. Pilgrim Health & Life Ins. Co., 227 S. C. 239, 87 S. E. 2d 685 (1955).

102. Register v. Life Ins. Co. of Va., 213 S. C. 508, 50 S. E. 2d 197 (1948). For a factually complicated case in which the jury found fraud but in which the court found no fraudulent design, see Welch v. Missouri State Life Ins. Co., 176 S. C. 494, 180 S. E. 447 (1935).

103. *See* Blackmon v. Independent Life & Accident Ins. Co., 229 S. C. 54, 91 S. E. 2d 709 (1956); Collopy v. Citizens Bank of Darlington, 223 S. C. 493, 77 S. E. 2d 215 (1953); Pack v. Metropolitan Life Ins. Co., 178 S. C. 272, 182 S. E. 747 (1935).

104. Yarborough v. Bankers Life & Cas. Co., 225 S. C. 236, 81 S. E. 2d 359 (1954).

105. Cook v. Metropolitan Life Ins. Co., 186 S. C. 77, 84, 194 S. E. 636 (1938).

106. Holland v. Spartanburg Herald-Journal Co., 166 S. C. 454, 165 S. E. 203, 84 A. L. R. 1336 (1932). The complaint alleged that plaintiff had sold his stock in the defendant newspaper company to one LaVarre in consideration, in part, of the continuance of his employment as business manager for three years; that when LaVarre sold out to the present owners, the board of directors ratified the contract; that defendant then discharged plaintiff without notice, with fraudulent and malicious

affirmed this holding, stating that "... punitive damages are not recoverable for the mere failure or refusal to pay a debt."[107] Retaining money in violation of a promise to return it is not a conversion but a mere breach of contract, unaccompanied by any fraudulent act.[108] But it is fraud to receive money for some particular purpose and to divert it to some other purpose and actually to convert it to one's own use.[109] Undoubtedly, the mere failure or refusal to pay the amount due under an insurance policy, no matter how willful or deliberate, is not a fraudulent act, standing alone.[110]

Second, an act done with a bona fide belief in one's right so to act is not fraudulent,[111] even though a court later holds he did not have the legal right to act as he did.[112] This is

---

intent to injure him in his livelihood, and appropriated to itself the money due plaintiff.

The Court affirmed striking of allegations as to punitive damages, saying, 166 S. C. at 468: "In his attempt to bring himself within this rule [punitive damages for fraudulent act], the plaintiff says that the defendant has appropriated to itself the salary which the plaintiff would have earned and that this was a fraudulent act. We cannot adopt this view. To do so would be equivalent to saying that every unpaid debt carries with it the implication of fraud on the part of the debtor; that the debtor has converted to his own use the money of another or that he has misappropriated that which was always his own."

See note 163 *post* for discussion of punitive damages for breach of employment contracts.

107. Patterson v. Capital Life & Health Ins. Co., 228 S. C. 297, 299, 89 S. E. 2d 723 (1955). Also see *e. g.*, Hall v. General Exchange Ins. Corp., 169 S. C. 384, 169 S. E. 78 (1933).

108. Ray v. Pilgrim Health & Life Ins. Co., 206 S. C. 344, 34 S. E. 2d 218 (1945). Plaintiff applied for an insurance policy and deposited $5 with defendant's agent; then she decided not to take the policy; the agent promised to refund the money but did not tender it until nearly three months later.

109. *See* Baker Wholesale Co. v. Fleming, 227 S. C. 312, 316, 87 S. E. 2d 876 (1955); National Bank v. Jennings, 38 S. C. 372, 377, 17 S. E. 16 (1893).

110. Owens v. Metropolitan Life Ins. Co., 178 S. C. 105, 182 S. E. 322 (1935); Hall v. General Exchange Ins. Corp., 169 S. C. 384, 169 S. E. 78 (1933). *See* also: Patterson v. Capital Life & Health Ins. Co., 228 S. C. 297, 89 S. E. 2d 723 (1955); Yarborough v. Bankers Life & Casualty Co., 225 S. C. 236, 81 S. E. 2d 359 (1954); Lamb v. Metropolitan Mutual Fire Ins. Co., 183 S. C. 345, 191 S. E. 56 (1937). Neither can plaintiff succeed in recovering punitive damages for such an alleged fraudulent act in a tort suit for fraud and deceit. Banahan v. Metropolitan Life Ins. Co., 214 S. C. 403, 52 S. E. 2d 809 (1949).

111. Jordan v. Equitable Life Assurance Society, 170 S. C. 19, 169 S. E. 673 (1933).

112. Hardee v. Penn Mutual Life Ins. Co., 215 S. C. 1, 53 S. E. 2d 861 (1949). *A fortiori* it would seem that action entirely within one's legal rights is not fraudulent. One alleged fraudulent act accompanying breach of the insurance agent's agency contract in Monroe v. Bankers Life & Casualty Co., Westbrook's Adv. Ops., Feb. 22, 1958, was the withholding of commissions due her. However, the contract provided that either party could terminate it *without cause* by giving notice. The Court

because fraud depends upon intent to deceive. Thus, where an insurer cancelled an accident insurance policy, believing in good faith that acceptance of renewal premiums was optional with the company under the terms of the policy, its act was not fraudulent, despite the later holding by the Supreme Court that the policy was non-cancellable and continuous because of an ambiguity in its terms.[113]

Since it is well nigh impossible to state a valid general rule as to what are fraudulent acts, the best approach to the problem is to see what particular acts have been found fraudulent in the cases. Indeed, there have been so many cases in this state holding various acts accompanying breaches of contracts fraudulent that it almost approaches a matter of inclusion and exclusion. Several distinct patterns have emerged, and plaintiffs understandably attempt to fit their cases into one or more of these. In the following classification, it is assumed that the fraudulent intent is present; the cases illustrate the variety of acts in which such fraud has been expressed. It should be remembered that the cases cited, unless otherwise stated, proceed on the theory of breach of contract accompanied by a fraudulent act, and that many other cases in tort for fraud and deceit have allowed punitive damages for a variety of fraudulent representations.

For the sake of convenience and analysis, the South Carolina cases in which punitive damages have been allowed for some fraudulent act accompanying the breach of contract can be classified into three broad groups: 1) those in which fraudulent representations together with some other act accompanied the breach; 2) those in which some fraudulent omis-

---

said: "This being true, it cannot reasonably be said that Appellant by bringing about its termination breached its conditions fraudulently." *But see* Philadelphia Storage Battery Co. v. Mutual Tire Stores, 161 S. C. 487, 159 S. E. 825 (1931), noted adversely in 45 Harv. L. Rev. 378 (1931) and favorably in Cornell L. Q. 479 (1932), in which the contract between plaintiff manufacturer of Philco radios and defendant jobber provided that either party could terminate it "upon the giving of written notice." In a suit on account after plaintiff's cancellation, defendant counterclaimed for actual and punitive damages on grounds that plaintiff had cancelled in pursuance of a fraudulent design. The overruling of plaintiff's demurrer was affirmed on grounds that defendant had stated some cause of action, since such an option to cancel a contract will not be enforced if contrary to "equity and good conscience." Justice Cothran vigorously dissented on grounds that action within one's legal rights could not be a legal wrong.

113. Harwell v. Mutual Benefit Health & Accident Assn., 207 S. C. 150, 35 S. E. 2d 160, 161 A. L. R. 183 (1945).

sion accompanied the breach; and 3) those in which various other fraudulent acts accompanied the breach.

1. *Misrepresentations and Affirmative Acts*

a. Retention of policy or premium receipt book. One very common fraudulent act in our cases has been the retention by defendant insurance companies of policies and/or premium receipt books obtained from the insured by fraudulent representations of the insurance agent. In several cases the agent acquired possession of such papers after death of the insured upon a promise that the company would pay the face value of the policy; when the company subsequently denied liability and retained possession of the papers, refusing to return them or to pay anything, verdicts for punitive damages have been affirmed.[114] In two other cases agents acquired possession of policies by telling aged women they could not get social security if they kept their insurance.[115] Another company retained possession of a premium receipt book which plaintiff customarily mailed in with each monthly payment.[116] Examples of other representations used to obtain possession of such papers are: a promise to bring a substitute policy in a few days[117] or to revive the policy,[118] or a representation that the policy was lapsed and could not be revived[119] or that the company had gone out of business making its policies worthless when it had really been bought out by another company.[120]

b. Substitution of policies or receipts. Fraudulent substitution of policies or receipts has been another fraudulent act of insurance agents. In one case the agent obtained possession of a straight life policy for $180 while the insured was sick

114. Henderson v. Capital Life & Health Ins. Co., 199 S. C. 100, 18 S. E. 2d 605 (1942); Derrick v. N. C. Mutual Life Ins. Co., 167 S. C. 434, 166 S. E. 502 (1932); Bradley v. Metropolitan Life Ins. Co., 162 S. C. 303, 160 S. E. 721 (1931) ($2,000 punitive damages).

115. Neely v. Industrial Life & Health Ins. Co., 192 S. C. 71, 5 S. E. 2d 568 (1939). *See* Barnes v. Industrial Life & Health Ins. Co., 201 S. C. 188, 22 S. E. 2d 1 (1942).

116. *See* Calder v. Commercial Casualty Ins. Co., 182 S. C. 240, 188 S. E. 864 (1936).

117. *See* Kelly v. Guaranty Fire Ins. Co., 176 S. C. 275, 180 S. E. 35 (1935).

118. *See* Walker v. Life Ins. Co. of Va., 177 S. C. 387, 181 S. E. 463 (1935).

119. Weaver v. Metropolitan Ins. Co., 197 S. C. 363, 15 S. E. 2d 673 (1941).

120. Williams v. United Ins. Co., 226 S. C. 574, 86 S. E. 2d 486 (1955) (agent tore up premium receipt book).

and returned a policy with a different beneficiary and with the face value reduced to $45 if the insured died within six months, as did in fact occur.[121] Another agent changed the number on a receipt book from that of a straight life policy for $250 to that of a health and accident policy with only a $50 death benefit.[122] One plaintiff was an ignorant and illiterate Negro woman who was intelligent enough to notice that the policy the agent took had a green border ($296 death benefit) but the one he returned had a purple border ($26.10 death benefit).[123]

c. Release fraudulently procured. Procuring a release by fraud will sustain a verdict for punitive damages in a suit for breach of the contract. Thus, it is fraud to tell an insured that a release in full is merely an application for a week's sick benefits.[124] It is also fraud to induce an insured to sign a release by telling him the company was going out of business but would pay him something out of sympathy if he would execute the release, when he had a valid substantial claim under the policy and when the company was merely being bought out by another one.[125] Likewise it is fraud to print a release in full on the back of a check given for weekly sick benefits when the ignorant insured thinks he is merely indorsing the check.[126] However, in these fraudulent release cases the claim of fraud is subject to many defenses, particularly negligence of the insured to inform himself what he is signing;[127] and there is the additional requirement that before a release can be attacked for fraud, the consideration received for it must be tendered back.[128]

---

121. Myers v. Industrial Life & Health Ins. Co., 170 S. C. 80, 169 S. E. 676 (1933).

122. Barber v. Industrial Life & Health Ins. Co., 189 S. C. 108, 200 S. E. 102 (1938) (verdict of $1,500 punitive damages reduced to $1,000 by trial judge).

123. Speed v. American Workmen, 199 S. C. 187, 18 S. E. 2d 732 (1942) (verdict of $800 punitive damages reduced by trial judge to $400 "to promote substantial justice").

124. *See* Bailey v. N. C. Mutual Life Ins. Co., 173 S. C. 131, 175 S. E. 73 (1934).

125. Hedgepath v. Provident Life & Accident Ins. Co., 169 S. C. 364, 168 S. E. 857 (1933) ($1,900.80 punitive damages).

126. Sutton v. Continental Casualty Co., 168 S. C. 372, 167 S. E. 647 (1933).

127. *See* Thomas v. American Workmen, 197 S. C. 178, 14 S. E. 2d 886, 136 A. L. R. 1 (1941).

128. Rice v. Palmetto State Life Ins. Co., 196 S. C. 410, 13 S. E. 2d 493 (1941); King v. Pilot Life Ins. Co., 181 S. C. 238, 187 S. E. 369 (1936).

d. Inducing a physical examination. In one case the agent induced the plaintiff to apply for reinstatement of her policy by falsely representing to her that the company had to check its policies once every seven years, and further induced her to submit to a physical examination by telling her the policy had lapsed for late payment of premiums. The company then declared her uninsurable because of poor health and lapsed her policy. The jury found that she had paid the premiums within the grace period and awarded substantial actual damages and $750 punitive damages; the Supreme Court affirmed.[129]

e. Inducing application for cash surrender value. In one case, one of three fraudulent acts was defendant's inducing plaintiff to apply for the cash surrender value of his policy by furnishing him with the proper application forms; this was a fraudulent act because the company did not intend to pay at the time they furnished the papers.[130]

f. Inducing insured to take out higher priced policy. One defendant lapsed a policy which had a monthly premium of $1.50, representing falsely to plaintiff that an act of the legislature had made the policy illegal and that it would violate the law to re-instate it, in an attempt to induce plaintiff to take out a new policy with a monthly premium of $2.57.[131]

2. *Fraudulent Ommissions*

a. Failure to collect premiums in violation of established custom. Perhaps the most common fraudulent act to be found in our cases is the failure of insurance agents to collect premiums. The law is well settled that if an insurance company deliberately discontinues collection of premiums from the insured in violation of its established custom and with the intention of cancelling a policy on which rights have accrued, a verdict awarding punitive damages will be affirmed.[132] The usual custom of agents is to collect premiums on industrial

129. Weaver v. Metropolitan Ins. Co., 197 S. C. 363, 15 S. E. 2d 673 (1941).
130. Scott v. Bankers Reserve Life Ins. Co., 183 S. C. 242, 190 S. E. 713 (1937).
131. Strawhorn v. Standard Mutual Life Assn., 195 S. C. 448, 12 S. E. 2d 4 (1940).
132. Hutcherson v. Pilgrim Health & Life Ins. Co., 227 S. C. 239, 87 S. E. 2d 685 (1955) ($950 punitive damages). *See* Raines v. Life Ins. Co. of Va., 228 S. C. 601, 605, 91 S. E. 2d 286 (1956).

insurance at the home of the insured or at his place of employment either weekly or monthly. Even though the policy provides that premiums are to be paid at the home office, a jury question as to waiver of this provision is presented if the agent has established a contrary custom of collecting from the insured.[133] In a typical case the plaintiff was an ignorant Negro woman who had paid a weekly premium of thirty cents for perhaps a year on a policy carrying $6 a week sickness or accident benefits; she was sick in bed for twelve weeks; defendant's agent paid her $12 for the first two weeks, then stopped collecting premiums when he saw her sick in bed; about a year later he returned and induced her to accept $12 in full settlement and to surrender the policy to him; a verdict for the plaintiff of $48 actual and $1475 punitive damages was affirmed.[134] Usually there is some circumstance in addition to the mere failure to collect premiums from which fraud may be inferred, such as the sickness of the insured at the last collection,[135] the agent's other knowledge of the bad health of the insured,[136] the fact that the insured had already paid more premiums than the face value of the policy,[137] or the fact that premiums had been collected regularly for ten years.[138]

Several things may defeat a recovery of punitive damages for this fraudulent act. The plaintiff may fail to prove an established custom.[139] There may be no proof that the collections were discontinued with the intention of causing a lapse.[140] The insured may not have made reasonable efforts to pay premiums at the insurer's office.[141] Or, in the cases where the insured had moved, the agent may have made re-

133. Riley v. Life & Cas. Ins. Co. of Tenn., 184 S. C. 383, 192 S. E. 394 (1937) ($1,000 punitive damages).
134. Bradley v. Washington Fidelity Nat. Ins. Co., 170 S. C. 509, 171 S. E. 243 (1933).
135. *Ibid.*
136. Clinkscales v. North Carolina Mutual Life Ins. Co., 201 S. C. 375, 23 S. E. 2d 1 (1942); Alexander v. Durham Life Ins. Co., 181 S. C. 331, 187 S. E. 425 (1936).
137. *See* Simmons v. Service Life & Health Ins. Co., 223 S. C. 407, 76 S. E. 2d 288 (1953) (company had collected over $200 on straight life policy with $150 death benefits).
138. Mack v. Life & Cas. Ins. Co. of Tenn., 171 S. C. 350, 172 S. E. 305 (1934).
139. Irby v. N. C. Mutual Life Ins. Co., 231 S. C. 164, 97 S. E. 2d 517 (1957).
140. Raines v. Life Ins. Co. of Va., 228 S. C. 601, 91 S. E. 2d 286 (1956); Harris v. United Ins. Co., 227 S. C. 593, 88 S. E. 2d 672 (1955).
141. Pinckney v. American Workmen, 196 S. C. 446, 14 S. E. 2d 273 (1941).

peated unsuccessful efforts to locate him;[142] if the agent makes even some efforts to locate him, that may be sufficient to prevent recovery of punitive damages even though his efforts are so inadequate as to amount to negligence and hence support a recovery of actual damages for breach of the contract.[143]

b. Refusal to collect or accept premiums with intent to lapse. A fraudulent act similar to failure to collect premiums contrary to established custom is an insurer's refusal to collect or accept premiums with the intention of lapsing or cancelling a policy upon which rights have accrued. These two fraudulent acts are similar in some respects, but in the latter, there need be no violation of established custom. If the insurer refuses to collect or accept premiums with the intention of cancelling a policy upon which rights have accrued, a verdict awarding punitive damages will be affirmed.[144] However, it would seem that if no rights have accrued under the policy, no punitive damages could be recovered.[145] Actions based on this fraudulent act are often referred to as actions for "fraudulent cancellation" in our cases. In one illustrative case, plaintiff was beneficiary on a policy on her son's life; defendant's agent refused to accept premiums on it, telling plaintiff that such an act would be unlawful since her son had been sentenced to life imprisonment, and that the policy was cancelled on orders from headquarters.[146] In another case the plaintiff desired to make one further payment that would pay up his policy for ten years so that he could borrow on it; defendant's agents would not accept the payment and kept shuttling him between the two of them because the agent in charge

142. Register v. Life Ins. Co. of Va., 213 S. C. 508, 50 S. E. 2d 197 (1948).

143. *See* Pack v. Metropolitan Life Ins. Co., 178 S. C. 272, 182 S. E. 747 (1935).

144. Davis v. Life Ins. Co. of Va., 195 S. C. 406, 11 S. E. 2d 433 (1940); Scott v. Bankers Reserve Life Ins. Co., 183 S. C. 242, 190 S. E. 713 (1937) (one of three fraudulent acts); Latta v. Sovereign Camp, W. O. W., 182 S. C. 215, 189 S. E. 126 (1936) ($1,500 punitive damages; prior appeal. 179 S. C. 376, 184 S. E. 157); Sturkie v. Commonwealth Life Ins. Co., 180 S. C. 177, 185 S. E. 541 (1936) ($1,500 punitive damages); Mitchell v. Mutual Benefit Health & Accident Assn., 178 S. C. 265, 182 S. E. 892 (1935); Schultz v. Benefit Assn. of Ry. Employees, 175 S. C. 182, 178 S. E. 867 (1935); Wilkes v. Carolina Life Ins. Co., 166 S. C. 475, 165 S. E. 188 (1932).

145. *See* Raines v. Life Ins. Co. of Va., 228 S. C. 601, 605, 91 S. E. 2d 286 (1956).

146. *See* Peay v. Durham Life Ins. Co., 185 S. C. 78, 193 S. E. 199 (1937).

of the policy at the time the loan went through would be penalized $5.[147]

c. Failure to send premium notices. Another act which may be fraudulent is the failure of an insurance company to send notice of premiums due when there is an established custom to do so.[148] This has not been the sole fraudulent act in any case to date, however.

d. Failure either to refund money or deliver policy. In one case plaintiff paid defendant's agent $1000 in a lump sum for two $500 endowment policies; by failing either to refund the money or to deliver the policies, defendant became liable for $950 punitive damages, for payment to the agent was payment to defendant, and defendant failed to correct the situation after knowing of it.[149] However, if failure to refund money had been the sole fraudulent act, there could have been no recovery of punitive damages.[150]

e. Fraudulent concealment. In one case plaintiff had brought a previous suit as beneficiary on policy A for $250 on the life of his son and defendant obtained a verdict by provthat policy A had lapsed and that the premiums supposedly paid on it had in reality been paid on policy B. Plaintiff then sued on policy B and recovered $700 actual and punitive damages on the theory that defendant acted fraudulently in concealing from him the existence of the second policy.[151]

f. Refusal to furnish claim blanks upon request. There is some doubt as to whether or not an insurer's refusal to furnish the insured with blanks to apply for benefits under the policy upon his request can be a fraudulent act. In the *Jamison* case[152] that was one possible fraudulent act among several. And in the *Alexander* case[153] the Court expressly affirmed a

147. Knox v. Metropolitan Life Ins. Co., 190 S. C. 504, 3 S. E. 2d 245 (1939).

148. *See* Yarborough v. Bankers Life & Cas. Co., 225 S. C. 236, 81 S. E. 2d 359 (1954); Harwell v. Mutual Ben. Health & Acc. Assn., 207 S. C. 150, 35 S. E. 2d 160, 161 A. L. R. 183 (1945); Jamison v. American Workmen Ins. Co., 169 S. C. 400, 169 S. E. 83 (1933).

149. Welch v. N. Y. Life Ins. Co., 183 S. C. 9, 189 S. E. 809 (1936).

150. *See* Yarborough v. Bankers Life & Cas. Co., note 148 *supra.*

151. Dyson v. Commonwealth Life Ins. Co., 176 S. C. 411, 180 S. E. 475 (1935).

152. Jamison v. American Workmen Ins. Co., 169 S. C. 400, 169 S. E. 83 (1933).

153. Alexander v. Durham Life Ins. Co., 181 S. C. 331, 187 S. E. 425 (1936).

charge that it was an insurer's duty to furnish such blanks and that its refusal to do so upon request of the insured would be a fraudulent breach of the contract justifying punitive damages if done with the intention of defrauding. However, in the *Shearer* case,[154] in which the agent promised to get the claim blanks for the insured but failed to do so, the Court reversed an award of punitive damages, saying that such an act was evidence of negligence or perhaps of wilfulness but not of fraud. It seems that the decision as to punitive damages in that case was based on the fact that after plaintiff no longer paid premiums, the defendant kept the insurance alive by charging the unpaid premiums as loans against the policy until its loan value was exhausted, its actions thus negating the inference of fraud. Then in the *King* case[155] the Court reversed an award of punitive damages, saying that such refusal to furnish application blanks was evidence of a wrongful act, but was not evidence of a fraudulent breach accompanied by a fraudulent act, relying on the *Shearer* case[156] as precedent, thus seeming to hold that it could not be a fraudulent act as a matter of law.

3. *Miscellaneous Fraudulent Acts*

a. Conveying land to third party in breach of promise to reconvey. In two cases arising on demurrers the defendant in each case held legal title to land conveyed to him by plaintiff but had contracted to reconvey to the plaintiff upon payment of a certain amount of money, and, in breach of his promise to reconvey, defendant conveyed to a third party a portion of the tract in one case[157] and all of it in the other.[158] In each case the Court said that the conveyance was a fraudulent act accompanying the breach of contract subjecting him to punitive damages.[159]

154. Shearer v. Pioneer Life Ins. Co., 183 S. C. 490, 191 S. E. 315 (1937).
155. King v. N. C. Mutual Life Ins. Co., 194 S. C. 367, 9 S. E. 2d 788 (1940).
156. Note 154 *supra.*
157. Ford v. Ball, 178 S. C. 111, 182 S. E. 319 (1935). Another possible fraudulent act in this case, besides conveying away the land, was a deceitful representation that defendant would deliver to plaintiff a written contract to reconvey.
158. Welborn v. Dixon, 70 S. C. 108, 49 S. E. 232, 3 Ann. Cas. 407 (1904).
159. Welborn v. Dixon, *ibid.*, involved a deed intended as a mortgage. It is a very unusual case in that it was an action at law (first cause of action) by the mortgagor-grantor against the mortgagee-grantee to

b. Interfering with arbitration. In one case an insurance adjuster assured plaintiff he would not interfere with the umpire and appraisers who were arbitrating the value of plaintiff's burned truck and carried plaintiff in his car away from the scene of the arbitration back to work. Then when the appraisers could not agree and called the umpire in, the insurance adjuster went into the room with them and did most of the talking. A verdict of $750 punitive damages was affirmed on grounds that partiality even without corruption was sufficient fraud to set aside an arbitration award in equity[160] and that there was sufficient evidence of the fraudulent intent and acts of the adjuster to justify punitive damages.[161]

c. Forgery. Where an insurance agent forged plaintiff's name to receipts for claims filed under a life and health policy, received the money from defendant, his employer, and converted the money to his own use, defendant was held liable to plaintiff for $490 punitive damages.[162]

d. Seizing sharecropper's portion of crops. Where the defendant ran plaintiff, his sharecropper, off the place after the crop was laid by, he was held liable in actual damages for breaching his contract and in punitive damages for his fraudulent act in taking exclusive possession of plaintiff's half of the crop.[163]

---

recover damages for breach of a contract to reconvey the land. Ordinarily, in cases of deeds intended as mortgages where the mortgagee-grantee has disposed of the land to a third party, suit is brought in equity to have the deed declared a mortgage. See annot., 46 A. L. R. 1089 (1927). There have been cases in South Carolina in which the grantee-mortgagee has conveyed to a third party in breach of a contract to reconvey to the mortgagor-grantor in which no action was brought on the contract but in which suit was brought in equity to redeem the land or for equivalent relief. For example, it has been held: 1) the mortgagee-grantee must account to mortgagor-grantor for proceeds received from sale less the mortgage debt, Mason v. Finley, 129 S. C. 367, 124 S. E. 780 (1924); 2) the mortgagor-grantor can redeem the land from a purchaser from the mortgagee-grantee who does not qualify as a bona fide purchaser for value without notice, Manigault v. Lofton, 78 S. C. 499, 59 S. E. 534 (1907); Bristow v. Rosenberg, 45 S. C. 614, 23 S. E. 957 (1896); 3) but he cannot redeem from such a purchaser who does qualify as a bona fide purchaser for value without notice, *see* Jones v. Hudson, 23 S. C. 494 (1885).

160. *See* annotation, 8 A. L. R. 1083.

161. Smith v. Home Ins. Co., 178 S. C. 436, 183 S. E. 166 (1936) (one of the few cases awarding punitive damages for breach of a fire insurance contract).

162. West v. Service Life & Health Ins. Co., 220 S. C. 198, 66 S. E. 2d 816 (1951).

163. Sullivan v. Calhoun, 117 S. C. 137, 108 S. E. 189 (1921). The legal relationship between the parties appears to have been one of land-

e. Fraudulent easement scheme. In one case the defendant had promised orally to allow plaintiff to lay a water pipe line across his property to reach city water, deceiving plaintiff into believing that the street privately owned by defendant was a public way. After digging had begun, defendant stopped the work, thus breaching his contract. The Court sustained a verdict awarding actual damages for the breach of contract and punitive damages for the deceit, for the whole scheme was a fraud, in the breach as well as in the inception.[164]

f. Falsifying weight records. In a case from another state following a similar rule, where a defendant contracted to harvest, process and buy a crop to be grown by plaintiff, and not

owner-sharecropper and not one of landlord-tenant. See Fischer, *Legal Aspects of Farm Tenancy and Sharecropping in South Carolina*, 9 S. C. L. Q. 341 (1957). If so, it was in effect an employment contract. Fischer, *supra* at 304.

In no other South Carolina cases involving employment contracts have punitive damages been allowed for a fraudulent act accompanying a breach of the contract. In Smyth v. Fleischmann, note 79a *supra*, the Court held that allegations as to punitive damages were appropriate, but the cause of action there was held to be one for fraud and deceit in inducing the contract, not for its fraudulent breach. In Holland v. Spartanburg Herald-Journal Co., note 106 *supra*, there was no allegation of a fraudulent act accompanying the breach of contract.

In Cooksey v. Beaumont Mfg. Co., 194 S. C. 395, 9 S. E. 2d 790 (1940), plaintiff, a watchman, alleged that defendant had breached its contract and its duty imposed by a statute requiring time and a half pay for Sunday work by giving him only a 10c a week raise and by cutting his pay from 34c to 32c per hour without notice to him. The Court held that a jury question was presented as to actual damages for breach of contract and of the statutory duty but found error in a refusal to charge that plaintiff was estopped to claim a higher wage by continuing in the week to week employment knowing of the change in his pay. However, the Court reversed the verdict as to punitive damages, saying (194 S. C. at 401): "We do not think there was evidence of such a wanton disregard of defendant's obligations and duties as would warrant this Court in finding that there was a fraudulent act accompanying the breach of contract."

Likewise, the federal court failed to find an allegation of a fraudulent act in the breach of a salesman's contract which breach was allegedly malicious and fraudulent. Sadler v. Pennsylvania Refining Co., 31 F. Supp. 1 (W. D. S. C. 1940, J. Wyche).

In Monroe v. Bankers Life & Casualty Co., Westbrook's Adv. Ops., Feb. 22, 1958, the two fraudulent acts allegedly accompanying the breach of an insurance agent's agency contract were: 1) that the local manager cancelled the contract because plaintiff had by-passed his office in applying for and obtaining leave of absence from the District Manager, and 2) that defendant withheld commissions due her with intent to defraud her. A jury verdict awarding no actual damages but $2,890 punitive damages was reversed and judgment entered for defendant.

Thus to summarize, the law as to employment contracts appears to follow the general rule that before punitive damages can be recovered, there must be a fraudulent act accompanying the breach. There are no theoretical bars to punitive damages in such cases, but as a practical matter, recovery of punitive damages on this theory seems difficult.

164. Porter v. Mullins, 198 S. C. 325, 17 S. E. 2d 684 (1941).

only failed to pay plaintiff for the amount actually harvested, but also falsified the weight records, he was held liable for $500 punitive damages, the New Mexico Supreme Court saying he was fortunate to get off so cheap.[165]

g. Other acts. In the *Yarborough* case[166] there were several possible fraudulent acts, among them failure to give receipts for one month's premiums plaintiff had paid and also an attempt to cancel his health and accident policy unless he would accept a rider which would exempt some ailments his wife had recently developed, the rider to be retroactive to a period for which the premiums had already been paid. A verdict for $7.50 actual and $1000 punitive damages was affirmed, the Court saying that while some of the acts considered separately might not evidence bad faith, all the circumstances taken together reasonably warranted an inference of breach of contract accompanied by fraudulent acts.

IV. IS THE SOUTH CAROLINA RULE SOUND IN PRINCIPLE?

Under the "independent tort" rule as followed in Texas, exemplary damages are recoverable in an action for breach of contract only when the breach is accompanied by an independent tort "... for which an action would lie for exemplary damages, independently of any right to recover actual damages by reason of the breach of contract alone."[167] In other words, under that rule, before the plaintiff can recover punitive damages in a contract action, he must in reality have two causes of action, one for breach of contract and another for an aggravated tort which must accompany the breach and for which tort punitive damages would be recoverable independently of the contract.

In one statement of the South Carolina rule, Justice Hydrick said that punitive damages were not recoverable in an action for breach of contract "... in the absence of circumstances giving rise to a cause of action for fraud."[168] This statement might lead one to believe that the South Carolina rule is but a variation of the Texas "independent tort" rule, but re-

165. Whitehead v. Allen, 63 N. M. 63, 313 P. 2d 335 (1957).
166. Yarborough v. Bankers Life & Cas. Co., 225 S. C. 236, 81 S. E. 2d 359 (1954).
167. Hooks v. Fitzenrieter, 76 Tex. 277, 13 S. W. 230 (1890).
168. Reaves v. Western Union Telegraph Co., 110 S. C. 233, 238, 96 S. E. 295 (1918).

stricted to fraud as the only permissible tort. If this were so, there would be little doubt but that our rule is sound in principle. Let us examine the cases and see if this is so. In other words, in every case in which punitive damages were recovered for a fraudulent act accompanying the breach of contract, would it have been possible for the plaintiff to have maintained an action for the fraudulent act alone and to have recovered punitive damages for it, apart from the breach of contract? Or, to put it differently, if it were not for our hybrid action of fraudulent breach of contract, could an action in which punitive damages are allowed be maintained for every fraudulent act in our cases? This depends on the nature of the fraudulent act.

For purposes of analysis, the fraudulent acts in our cases can be divided into the two broad classes of representations and omissions. A few fraudulent acts, such as conveying away land held under a mortgage, may not fall into either class, but most fraudulent acts fall into one or the other category.

A. Representations

It is clear that if a representation is a component of the fraudulent act, a separate action in which punitive damages could be recovered could be maintained for the fraudulent representation alone, although there may be other fraudulent acts along with the representation, such as retention of an insurance policy obtained by means of a fraudulent representation made to the insured. That action would be an action at law in tort for fraud and deceit, the elements of which are:[169]

> (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) his intent that it should be acted upon by the person; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury.

If the nine elements were present in the representation, a tort action for deceit could be maintained for it. In the usual deceit case the fraudulent representation accompanies the formation of a contract, but there is no reason why it could not be remedied in a deceit action if it accompanied the

169. Weatherford v. Home Finance Co., 225 S. C. 313, 317, 82 S. E. 2d 196 (1954).

breach. Thus, in one deceit case an insurance agent obtained possession of plaintiff's paid up policy by promising to revive it, and the company failed to revive it or to return it;[170] the fraudulent act was similar to that in many fraudulent breach cases where a policy is retained, but plaintiff could not have sued on that theory because his policy was paid up; it had not been breached. In another deceit case the fraudulent act was an insurance agent's fraudulent representations inducing plaintiff to make an exchange of policies,[171] a situation quite similar to the fraudulent breach cases in which a policy is substituted.

Of course, as a practical matter, where a contract has been breached and there has been a fraudulent act accompanying it, the plaintiff will sue for breach of contract accompanied by fraudulent act rather than in tort for deceit; for in the latter action he can recover nothing if no fraud is proved, while in the former action even though no fraud is proved, thus preventing him from recovering punitive damages, he can nevertheless recover actual damages for the breach of contract if that is proved.[172] And even the slightest nominal damages resulting from the breach would be sufficient to support a verdict for punitive damages in an action for fraudulent breach if fraud were proved.[173]

Punitive damages are recoverable in a deceit action because of the wilful and intentional nature of the tort.[174] Thus, if the fraudulent act were a representation actionable in deceit apart from the breach of contract, the only substantial theoretical objection to allowing recovery of punitive damages for it in an action *ex contractu* would be based on an adherence to the distinction between the common law actions of assumpsit and trespass on the case. This seems the view of the English court and of most American courts, that punitive damages are recoverable in tort, but not in contract, and that one consequence of a plaintiff's choosing to sue in contract is

170. Cook v. Metropolitan Life Ins. Co., 186 S. C. 77, 194 S. E. 636 (1938) ($256 punitive damages).

171. Grayson v. Fidelity Life Ins. Co., 114 S. C. 130, 103 S. E. 477 (1920).

172. Broome v. Travelers Ins. Co., 183 S. C. 413, 191 S. E. 220 (1937).

173. *See* Barnes v. Industrial Life & Health Ins. Co., 201 S. C. 188, 193, 22 S. E. 2d 1 (1942).

174. Weatherford v. Home Finance Co., 225 S. C. 313, 320, 82 S. E. 2d 196 (1954).

that he can recover no more than actual damages.[175] However, it would seem "an arbitrary and illogical limitation" to confine punitive damages to actions *ex delicto*.[176] Particularly is this so since the advent of the modern procedural codes which purport to abolish the common law forms of action.[177] This is the reasoning behind the "independent tort" rule in Texas where the forms of action have never been in force.[178] The most weighty reason favorable to a continued adherence to the orthodox common law doctrine is the rule of *stare decisis* and the fear that a change would unsettle the law of contracts.[179] But once a contrary rule has been adopted as in Texas and in South Carolina, the same reason applies with equal force for adhering to it.

B. OMISSIONS

A more difficult problem is presented by those fraudulent acts which we may classify as fraudulent omissions and which may be termed "negative acts." The fraudulent acts falling into this class are the more numerous in our cases, and include such things as failure to collect premiums in violation of established custom and refusal to accept premiums with the intention of causing a lapse of the policy. These fraudulent acts could not be the basis of a tort action for deceit, in the usual case. Take, for example, the situation typical in our cases where the insurance agent establishes the custom of collecting premiums at the home of the insured, the insured becomes ill, and the agent then forms the intention of causing a lapse of the policy by discontinuing collections and does so. Here there could be no tort action for deceit, for that action remedies only fraudulent representations. It would be hard to find a fraudulent representation in the above example, but even if the established custom of dealing be said to be a representation implied from his conduct that the agent will continue regular collections in the future, how could it be said that the representation was made with intent to defraud? At

175. Addis v. Gramophone Co., Ltd., [1909] A. C. 488, 3 B. R. C. 98, 16 Ann. Cas. 98 (House of Lords) (See especially opinion of Lord Atkinson at [1909] A. C. 488, 496).
176. *Id.* at 498 (dissenting opinion of Lord Collins).
177. Welborn v. Dixon, 70 S. C. 108, 116, 49 S. E. 232, 3 Ann. Cas. 407 (1904).
178. *See* Briggs v. Rodriguez, 236 S. W. 2d 510, 515 (Tex. Civ. App. 1951).
179. *See* dissent of Woods, J., in Welborn v. Dixon, 70 S. C. 108 at 122.

the time the agent was making the representation, that is, establishing the custom of regular collections, he did not have the intent to defraud the insured by causing a lapse; it was only later, when the insured became ill, that his deceitful intention was formed. Thus, the elements of a tort action for deceit are lacking.

If South Carolina did not allow recovery of punitive damages in a fraudulent breach action, the only remedy at law of the insured in the example above would be an action for breach of contract in which he could recover only actual damages. The insured would have another remedy for fraudulent cancellation of his insurance policy, however, but it would be in equity, not at law. Where an insurer wrongfully cancels a policy, equity will set aside the cancellation and order the policy reinstated. South Carolina cases have by dicta recognized such a remedy,[180] but no case has been found in which this remedy was sought for a wrongful or fraudulent cancellation, probably because the action at law for actual and punitive damages is so much more satisfactory to the plaintiff. But such a remedy has been sought and such relief granted elsewhere.[181] Thus, a fraudulent omission would be actionable only in equity, if there were no action for fraudulent breach of contract.

However, punitive damages could not be recovered in equity[182] because it is beyond the power of a court of chancery to award them.[183] Hence a litigant waives all right to recover punitive damages when he goes into equity.[184]

---

180. *See* Shuler v. Equitable Life Assurance Society, 184 S. C. 485, 490, 193 S. E. 46 (1937); Davis v. Bankers Life & Cas. Co., 227 S. C. 587, 591, 88 S. E. 2d 658 (1955).

181. *E. g.*, Tabor v. Michigan Mutual Life Ins. Co., 44 Mich. 324, 6 N. W. 830 (1880) (fraudulent cancellation); Meyer v. Knickerbocker Life Ins. Co., 73 N. Y. 516, 29 Am. Rep. 200 (1878) (wrongful cancellation); Riegel v. American Life Ins. Co., 140 Pa. St. 193, 21 Atl. 392, 23 Am. St. Rep. 225, 11 L. R. A. 857 (1891) (policy surrendered through mutual mistake); First Texas Prudential Ins. Co. v. Ryan, 125 Tex. 377, 82 S. W. 2d 635 (1935) (wrongful cancellation).

182. *See* Standard Warehouse Co. v. A. C. L. RR, 222 S. C. 93 at 102-103, 71 S. E. 2d 893 (1952); Welborn v. Dixon, 70 S. C. 108, 118, 49 S. E. 232, 3 Ann. Cas. 407 (1904); Busby v. Mitchell, 29 S. C. 447, 452, 7 S. E. 618 (1888). See Annotation, 48 A. L. R. 2d 947.

183. *See* Mortgage Loan Co. v. Townsend, 156 S. C. 203, 229, 152 S. E. 878 (1930); Bratton v. Catawba Power Co., 80 S. C. 260, 263, 60 S. E. 673 (1908).

184. *See* Bird v. W. & M. RR Co., 8 Rich. Eq. 46, 57, 64 Am. Dec. 739 (S. C. 1855).

Hence, we are forced to conclude that South Carolina does not follow the "independent tort" rule restricted to fraud as the independent tort. And it follows that the statement of Justice Hydrick[185] is an accurate statement of the present status of the rule only if it includes both legal and equitable causes of action for fraud. Hence, we must conclude that insofar as fraudulent omissions are concerned (equitable causes of action for fraud), our rule is not sound in principle, unless there is some other reason for it.

The justification for the rule lies in the policy of the courts to suppress fraud.[186] The method of executing this policy is by punishing the defendant found guilty of fraud by assessing punitive damages against him as in the case of any other wilful and intentional wrong. The reasons for allowing recovery of punitive damages in the usual tort case are two-fold. From the aspect of the plaintiff personally, they are allowed to vindicate his private right where it has been violated wantonly, wilfully, or maliciously.[187] And from the aspect of society, they are allowed in the interest of society as punishment of the wrongdoer to prevent him from repeating the wrongful act and as a warning and example to deter others from committing like offenses.[188]

From a technical legal point of view, it may be necessary to distinguish between tort and contract and between legal and equitable causes of action for fraud. But from the viewpoint of policy, these distinctions are not so important. If the policy of the courts is to suppress fraud, then they should suppress it by awarding punitive damages to the defrauded plaintiff to punish the defrauding defendant, whether his fraud be legal or equitable in nature. A fraud actionable only in equity can be just as damaging to the plaintiff and just as

185. Reaves v. Western Union Telegraph Co., 110 S. C. 233, 238, 96 S. E. 295 (1918): "Nor is there any doubt of the rule that punitive damages are not recoverable for the mere breach of a private contract, in the absence of circumstances giving rise to a cause of action for fraud."

186. *See* Thomas v. The American Workmen, 197 S. C. 178, 182, 14 S. E. 2d 886, 136 A. L. R. 1 (1941): "The policy of the Courts is, on the one hand, to suppress fraud, and on the other, not to encourage negligence and inattention to one's own interest. Either course has obvious dangers. But the unmistakable drift is toward the just doctrine that a wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of the ignorant and unwary."

187. *See* Beaudrot v. Southern Ry., 69 S. C. 160, 48 S.E. 106 (1904).

188. *See* Bowers v. C. & W. C. Ry., 210 S. C. 367, 42 S. E. 2d 705 (1947) (concurring opinion of Oxner, J.).

socially reprehensible as one actionable at law for deceit. An omission or concealment can be as fraudulent as a representation or other affirmative act.[189] Therefore, if an omission is the result of the defendant's intent to defraud, it should be punished as much as should an affirmative act done with the same intent.

V. CONCLUSION

The defendants who have felt the weight of South Carolina's peculiar rule most heavily have been the insurance companies, which, at times, have complained that they have been treated unfairly in the courts of this state by having punitive damages awarded against them.[190] And, undoubtedly, some juries have been harsh with them. However, the largest verdict to date assessing punitive damages against an insurance company in a fraudulent breach case was one for $2,000,[191] a sum which does not compare, for example,[192] with the punitive damages which have been awarded in some personal injury and wrongful death cases.

Insurance companies should recognize the fact that they owe a higher duty to the people with whom they deal than do most other types of business. For example, their agents have a duty to use due care in forwarding applications for insurance to the company.[193] And the company is probably under the duty to accept or reject the application within a reasonable time.[194]

---

189. Donaldson v. Temple, 96 S. C. 240, 244, 80 S. E. 437 (1913) (dissent).

190. *See* Mooney, *Punitive Damages for Breach of Insurance Contracts in South Carolina*, Insurance Law Journal (Jan. 1955), p. 20.

191. In Bradley v. Metropolitan Life Ins. Co., 162 S. C. 303, 160 S. E. 721 (1931). A verdict for $1,900.80 punitive damages was recovered and affirmed in Hedgepath v. Provident Life & Accident Ins. Co., 169 S. C. 364, 168 S. E. 857 (1933). A verdict of $2,890 punitive damages was reversed in Monroe v. Bankers Life & Casualty Co., Westbrook's Adv. Ops., Feb. 22, 1958, because not supported by actual damages.

192. *See, e. g.*, Mock v. Atlantic Coast Line RR, 227 S. C. 245, 87 S. E. 2d 830 (1955) in which a verdict of $50,000 actual and $15,000 punitive damages for the wrongful death of a twelve year old child was affirmed over objections of excessiveness, and the cases cited therein.

193. Tobacco Redrying Corp. v. U. S. Fidelity & Guaranty Co., 185 S. C. 162, 193 S. E. 426 (1937). Plaintiff applied to defendant's agent for both public liability insurance and for employer's liability insurance; the agent sent to defendant the application for the former but failed to send that for the latter. After plaintiff had to pay for liability to an employee, plaintiff sued in tort for negligence of the defendant's agent in failing to forward the application which would have been accepted if received. Judgment for plaintiff affirmed.

194. In Moore v. Palmetto State Life Ins. Co., 222 S. C. 492, 73 S. E. 2d 688 (1952), noted 5 S. C. L. Q. 613, plaintiff applied for life insur-

In considering fraud with reference to insurance companies, two factors must be kept in mind: 1) the duty resting upon the insurer and 2) the type of insured they deal with. As to the first, our Supreme Court, following Pomeroy,[195] has classified an insurance contract as one intrinsically fiduciary in its essential nature, requiring the utmost good faith and fullest disclosure of material facts.[196] Consequently, an act done by someone occupying such a fiduciary relationship might well be fraudulent when it would not be so if done by someone upon whom a lesser duty rests.

As to the second, the intelligence, experience, age, mental and physical condition, and knowledge and means of acquiring it on the part of the insured must be considered.[197] This is bound up with the right to rely on the representation in tort cases for fraud and deceit. Many of the plaintiffs recovering punitive damages in our cases have been persons of the type on whom fraud is most easily practiced, "the ignorant and unwary," to use Mr. Justice Fishburne's phrase.[198] Insurance companies doing business in South Carolina, seeking their fortunes from the people of this state, must take them as they find them; and if some of them are easily misled due to lack of educational opportunities or otherwise, the insurance companies should blame only their own agents for not exhibiting more prudence, caution, patience, restraint and honesty. They should not blame our Court for developing, and our juries for applying, a rule of law which makes it possible to punish frauds merely because other states have apparently not seen fit to punish them, or at least not in the same manner.

---

ance on her husband on March 3, 1951, paying a deposit of 20 cents. The husband was killed June 3, and, although the company rejected the application on March 19, plaintiff was not notified until after his death. In a suit to recover on the policy, a verdict for plaintiff was affirmed 3-2, the majority of the court resting its decision on the grounds that there had been an implied acceptance of the offer [application]. 222 S. C. at 502. A tort action may possibly exist for such delay. 222 S. C. at 503. The Court quoted from 12 APPLEMAN, INSURANCE LAW AND PRACTICE § 7226: " 'The more liberal, and probably the better rule, is to the effect that an insurance company obtaining an application for insurance is under a duty to accept it or to reject it within a reasonable time, and is liable if it delays unreasonably in acting thereon. It must also act with reasonable promptness in delivering a policy. . . .' "

195. 3 POMEROY, EQUITY JURISPRUDENCE §§ 902, 907 (5th ed. 1941).

196. *See* Holly Hill Lumber Co. v. McCoy, 201 S. C. 427, 23 S. E. 2d 372 (1942).

197. *See* Thomas v. The American Workmen, 197 S. C. 178, 182, 14 S. E. 2d 886, 136 A. L. R. 1 (1941).

198. *Ibid.*

When the British House of Lords decided that punitive damages could not be recovered in an action *ex contractu,* one of its reasons was that if the plaintiff had a cause of action in tort for the wrongful act accompanying the breach, he could recover punitive damages in a tort action; but if not, the wrongful act should not become actionable or relevant as an element of aggravation of the breach of contract.[199] But the very thing that would make some fearful of our peculiar rule may be its greatest worth: it makes possible the punishment of frauds which the law has not otherwise developed adequate means of remedying. Thus, in the leading English case, Lord Collins in dissent said that the power of the jury to award punitive damages should not be curtailed, for it is "... a salutary power, which has justified itself in practical experience, to redress wrongs for which there may be ... no other remedy."[200] The eminent lord could have been speaking of South Carolina's peculiar rule.

HENRY SUMMERALL, JR.

199. Addis v. Gramophone Co., Ltd., [1909] A. C. 488, 3 B. R. C. 98, 16 Ann. Cas. 93 (House of Lords) (concurring opinion of Lord Shaw of Dunfermline).
200. *Id.* at 500 (dissent).